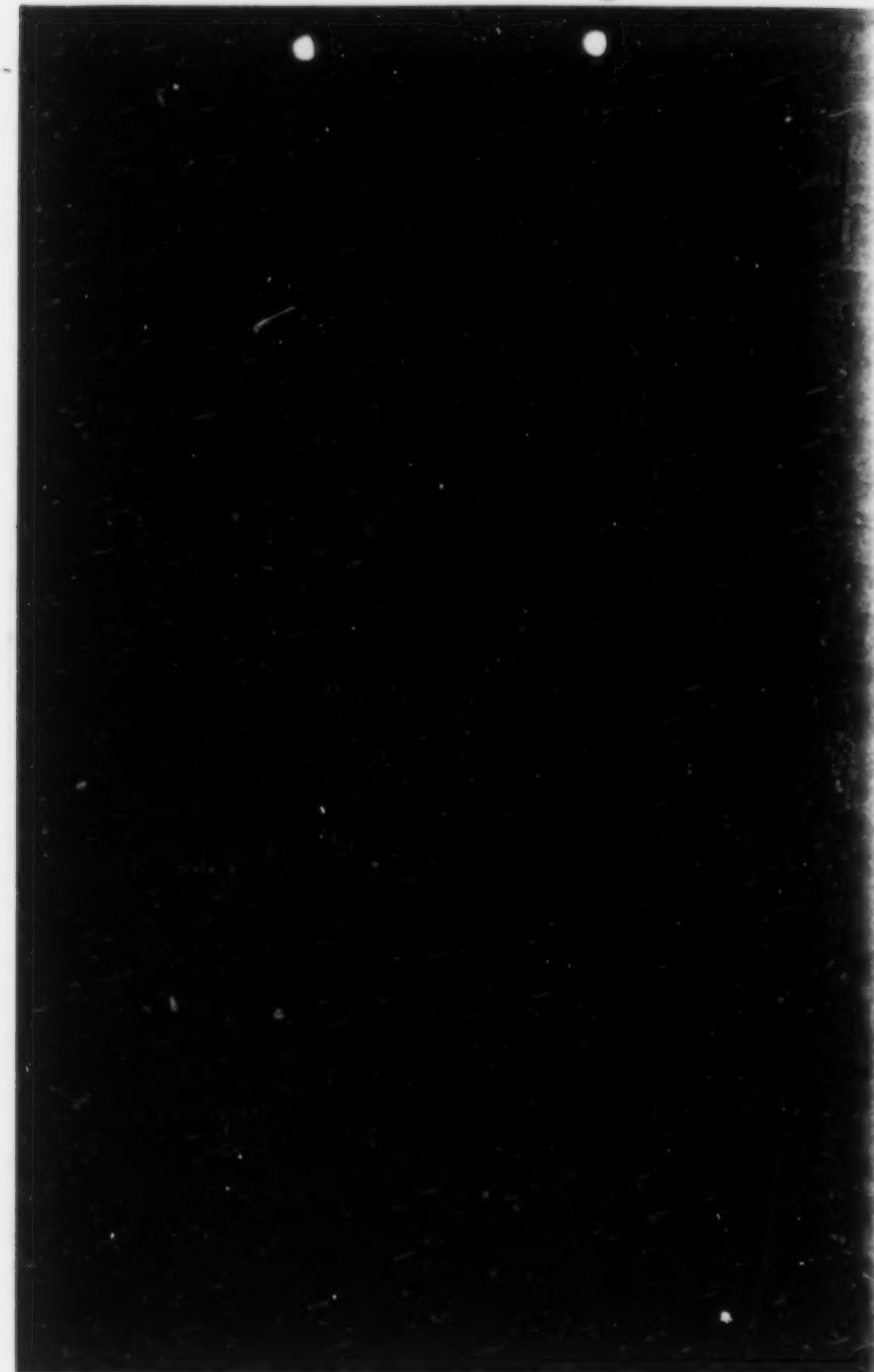


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COUNTERSTATEMENT OF THE QUESTION PRESENTED

WHETHER, IN A CRIMINAL CASE, A STATE TRIAL COURT MAY PROPERLY RESTRICT THE INTRODUCTION OF FACTS RELATING TO THE VOLUNTARINESS OF A DEFENDANT'S CONFESSION, ONCE THAT ISSUE HAS BEEN CONCLUSIVELY DETERMINED IN A PRE-TRIAL SUPPRESSION HEARING, WHERE THE DEFENDANT CLAIMS THE SAME FACTS ALLEGED TO SHOW COERCION ALSO SHOW A LACK OF CREDIBILITY.

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OPINION BELOW

The Opinion below is correctly set forth in the petitioner's appendix.

JURISDICTION

The jurisdiction of the Court is properly set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are correctly set forth in the petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth correctly in the petition.

COUNTERSTATEMENT OF THE CASE

The petitioner, Major Crane, was indicted October 13, 1982, for the murder of Randall Todd (Transcript of Record, hereinafter TR, 1). The deceased worked at Keg Liquors, a small liquor store located in Louisville, Kentucky, and was killed by a single bullet wound in the back of the head (Transcript of Evidence, Volume II, hereinafter TE, II 4). Although robbery was suspected as a motive, no money was taken (TE IV 54). After a fruitless investigation, the Louisville police were tipped that Crane was a participant in the burglary of a gas station (Suppression Hearing, hereinafter Sup., 7). Petitioner was picked up on this charge following an eyewitness identification by another participant in the burglary, Patrick Holder (Sup. 7-8). Crane was taken to a police station where he was given his rights and his family was notified (Sup. 9). While one of the officers was filling out an arrest slip, Major Crane suddenly began confessing to a series of crimes, and it was decided to take him to the Youth Bureau in order to investigate further (Sup. 10-11).

At the Youth Bureau petitioner was being questioned about the other robberies when he suddenly confessed to shooting "up in the air" at Keg Liquors, although he knew it was "where that guy got killed" (Testimony of Detective Burbrink, Sup. 14). The detectives then started a tape and recorded petitioner's confession (TE II 14-30).

Pursuant to Kentucky Rule of Criminal Procedure 9.78 a Pretrial Suppression Hearing was held. Crane took the stand in his own behalf, testifying that he was threatened with beatings if he didn't follow the instructions of the police (Sup. 51). According to Crane he was forced to sign a waiver of rights and was told what to say (Id., 51, 58-59). However, the trial court, in its findings, found Petitioner Crane's confession

entirely voluntary, holding that: (1) there was no sweating or coercion; (2) there was no delay in taking the petitioner to the Youth Detention Center; (3) in comparing the conflicting testimony between petitioner and the police officers the credibility "lies entirely with the police;" and (4) petitioner has had numerous dealings with the law, is "street wise" and understood his rights (TR 66-67).

At trial, Crane sought to make the most of certain inconsistencies in his confession. The two major inconsistencies were Crane's statement that during the robbery "sirens and stuff started going off and I shot up in the air" and that he "got \$300 or \$400 out of there." (TE II 16). Later testimony developed the facts that there was no alarm system at Keg Liquors that night (Id. at 35) and that no money was taken (TE IV 54). Crane's confession also included a statement that he had used a .357 caliber weapon, when in fact the weapon used to kill Randall Todd was .32 caliber (TE II 64). According to testimony, however, petitioner later changed his mind about the caliber of the weapon, conceding that it was indeed a .32 (Id., 37 and 46).

Despite these inconsistencies there was strong evidence to convict Major Crane. The confession itself was strengthened by his knowledge of what was found at the scene. Detective Burbrink asks:

'Did you notice anything on the counter, like maybe someone had just bought something that was in a bag?' Crane replies: 'A half-pint of liquor, that is what it was.' 'What kind was it?' 'It was a half-pint of liquor. I still can't remember what kind it was. It was a half-pint.' (TE II 21-22).

Commonwealth's Exhibit No. 3 is a photograph of the counter of Keg Liquors as it was found by the police. It quite clearly shows a half-pint of liquor, alone on the counter, next to the

cash register (TE IV 49-50). Later testimony indicated that the sale price for that half-pint had been rung up on the cash register but that Randall Todd had been killed before the tax could be added (Id., 48-49). Crane's confession was also buttressed by the statement of George Howard Williams, who had been implicated by petitioner in his own confession (TE II 17). Although Mr. Williams retracted his statement at trial, he had earlier admitted ordering the half-pint which figured so prominently in this case (TE IV 10). Shortly thereafter, Williams stated, petitioner entered the liquor store, said "This is a hold up" and when the man "went to turn to go back to the back Major fired" (Id.). Finally, petitioner's mother made a statement to the police on August 15, 1981, in which she related that during a conversation with Major he stated that he knew that George Williams was involved in the incident at Keg Liquors, that Williams had robbed, shot and killed a man (Id., 60-62).

Crane did not take the stand at trial. Crane did, however, introduce two witnesses whose testimony was virtually identical. Each testified that after they heard the sirens of the police responding to the shooting at Keg Liquors, they looked outside to see what was the matter (TE V, 3 and 11). The first witness, Mary Pablo, then testified that she saw a white man on a street corner opposite Keg Liquors get into a yellow car and, as the car was driven past the location of the witness, a beer bottle was thrown out (Id., 3-5). The second witness, James Powell, Jr., saw only the yellow car and the beer bottle (Id., 9-10). Apparently the jury was intended to believe that the mysterious white man was somehow involved, but there was no evidence to that effect.

Based on this testimony, the jury was instructed on all degrees of homicide (TR 120-127). The jury found

petitioner guilty of Wanton Murder and recommended forty years imprisonment (Id., 129). Major Crane was sentenced to the recommended term on January 5, 1984 (Sentencing Hearing 5). On appeal, Crane raised only one issue; the same issue that is presently before this Court. In an opinion rendered February 28, 1985, the Kentucky Supreme Court affirmed Major Crane's conviction. Crane v. Commonwealth, Ky., 690 S.W.2d 753 (1985). This petition for a writ of certiorari results.

ARGUMENT

THE TRIAL COURT CORRECTLY EXCLUDED PETITIONER'S ATTEMPT TO PLACE BEFORE THE JURY TESTIMONY RELATING TO FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH HAD ALREADY BEEN DECIDED AT A PRETRIAL SUPPRESSION HEARING.

The sole issue raised by Major Crane in his petition is "whether denial of the opportunity to familiarize the jury with the facts concerning the taking of a confession is solely a matter of state evidentiary law or whether such denial must satisfy the due process of law provision of the Fourteenth Amendment of the Constitution and the confrontation provision of the Sixth Amendment" (Petition for writ of certiorari, at 6). The Commonwealth submits that this issue is indeed a matter of state evidentiary law and that the petition should be denied.

Prior to 1942, Kentucky law mandated the submission to the jury of questions regarding the voluntariness of a confession when that confession was attacked under the "Anti-Sweating" Statute. Kentucky Revised Statutes 422.110. In that year an amendment was adopted, the purpose of which was to "abolish this practice [submitting the determination of admissibility to a jury] and to vest this function in the trial

judge." Bass v. Commonwealth, Ky., 177 S.W.2d 386 (1944); Herd v. Commonwealth, Ky., 171 S.W.2d 32 (1943). This amendment to the statute was held constitutional and, under the statute, "no error is committed in failing to submit the question of admissibility of the confession to the jury." Karl v. Commonwealth, Ky., 288 S.W.2d 628 (1956). In Karl, however, the jury was permitted to hear the circumstances of the confession following a determination by the trial judge that the confession was competent and therefore admissible (Id. at 633):

Either party then has a right to produce before the jury the same evidence which was submitted to the court when the court was called upon to decide the question of competency and admissibility and all other facts and circumstances relevant to the confession or affecting its weight or credit as evidence. (Id.).

Karl is distinguishable from the issue involved in the present case, however, because what was being decided in Karl was not the voluntariness of the confession as a finding or issue of fact, but the admissibility of the confession as a matter of law, leaving a later finding of fact that it was given voluntarily within the province of the jury. This distinction was reiterated in Bradley v. Commonwealth, Ky., 439 S.W.2d 61 (1969), which was used by the Court to bring Kentucky law on search and seizure as well as confessions into conformity with Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Following Jackson, the Kentucky Court of Appeals mandated in Bradley the use of a pretrial suppression hearing and an admonishment to the jury, following a motion to suppress:

[T]he question of voluntariness (in case of a confession) or consent (in case of a search) should be first determined by the trial judge outside the presence of the jury on the basis of an evidentiary hearing of the pertinent evidence on both sides. Only

if the trial court finds the evidence to have been validly obtained is it admissible in evidence before the jury, in which event the trial court should admonish the jury not to consider the evidence unless it finds beyond a reasonable doubt that the defendant freely and voluntarily consented to the search (or, in the case of a confession, that he gave it voluntarily and free of coercion). (Id., at 64).

Again, the trial court made an initial determination that the confession was admissible, and had to then admonish the jury on its consideration of the issue of voluntariness or coercion.

This recitation of prior Kentucky evidentiary law provides the background for the consideration of Kentucky Rule of Criminal Procedure 9.78, which provides:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive. [Emphasis added].

This rule was interpreted in Hamilton v. Commonwealth, Ky., 589 S.W.2d 208 (1979) which held that:

The effect of KCr 9.78 is to obviate the procedural requirement of submitting the issue of voluntariness of a confession to a jury following the determination of that issue by the trial judge. Consequently, since we have held in this opinion that the trial judge found that appellant's confession is admissible, it follows that there was no error in his failure to present the issue of voluntariness to the jury. The finding of the trial judge is conclusive and an admonition to the jury was unnecessary. (at 210).

Kentucky Rule of Criminal Procedure 9.78, therefore, set Kentucky firmly in the Wigmore or "orthodox" camp which places the determination of the admissibility of a confession in the hands of the trial judge alone. Crane v. Commonwealth, Ky., 690 S.W.2d 753, 754 (1985), affirms this procedure.

Petitioner Crane now challenges one of the logical consequences of this approach. At the close of the suppression hearing the trial court made its "findings resolving the essential issues of fact" surrounding petitioner's confession (Sup., 73-76). Petitioner recognized that a ruling by the trial court on an issue of fact, once decided and supported by substantial evidence, cannot be attacked. For example, petitioner conceded on appeal that he "could not argue to the jury that he was beaten by the police in order to show that his statement was involuntary" (Brief for Appellant, p. 8-9). What petitioner wants to do nevertheless, is to bring in the same evidence used and rejected in the determination that the confession was "voluntary" on the grounds that such evidence would imply that the confession was not "credible."

In Crane v. Commonwealth, supra, the Kentucky Supreme Court rejected this approach, based upon the trial court's ruling that the evidence sought to be excluded related solely to voluntariness. Id., at 754. Because it related solely to voluntariness the evidence was irrelevant. It did not go to the credibility of the confession but was instead an attack on "the credibility of the trial judge and his ruling on voluntariness." Id., at 755.

Under Kentucky law it is well-settled that evidence, to be admissible, must be relevant to prove or disprove a fact in issue. Fitzgerald, Kentucky Practice: Criminal Practice

and Procedure (1978), §867 p. 419, citing Pruitt v. Commonwealth, Ky., 487 S.W.2d 940 (1972); Hartman v. Commonwealth, Ky., 282 S.W.2d 48 (1955). Once the trial court has complied with the mandate of Kentucky Rule of Criminal Procedure 9.78 by holding a suppression hearing and making specific findings of fact and conclusions of law, the Commonwealth submits that it is within the sound discretion of the trial court to limit testimony at trial to facts which are at issue. In the instant case it was obvious from the colloquy between the bench and defense counsel that the trial court fully understood petitioner's contention that the proffered testimony dealt with another issue -- "credibility" -- and specifically rejected it (TE II 307). In Lego v. Towney, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618, 625 (1972), this Court stated the following regarding its decision in Jackson v. Denno, supra:

The procedure we established in Jackson was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in Jackson questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief. (Id. at 485-486; Emphasis added.).

In Crane v. Commonwealth, supra, the Kentucky Supreme Court followed the plain language of Lego in upholding Kentucky's adherence to the "orthodox" rule. Id., at 754. Logically flowing from that rule is the fact that once the trial court determines that the confession has been given voluntarily, it

may limit the addition of other irrelevant evidence on the same subject. Far from requiring that the circumstances of a confession must be presented to the jury, Lego merely affirms that Jackson did not limit or alter the evidence available to the jury under the law of the various jurisdictions. The Kentucky Supreme Court followed this interpretation in deciding Crane v. Commonwealth, supra.


In Kentucky, the control of the amount of evidence produced on any one point is clearly within the discretion of the trial court, Woods v. Commonwealth, Ky., 305 S.W.2d 935, 937 (1957), whether at trial as in Woods or prior to trial, Freeman v. Commonwealth, Ky., 425 S.W.2d 575 (1968). In addition, it is recognized that the trial court may properly limit the scope and extent of cross-examination if circumstances require. Hatton v. Commonwealth, Ky., 444 S.W.2d 731 (1969). These principles are so universal that no citation to federal or other authority is deemed important. Unless this Court is prepared to overthrow the "orthodox" rule, such decisions as were made in this case will always be necessary. In addition, as Crane v. Commonwealth, supra at 755, points out, there are significant dangers to any other approach. Petitioner's rights were fully protected by Kentucky Rule of Criminal Procedure 9.78 and by the ruling of the trial court, as affirmed by the Kentucky Supreme Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

MAJOR CRANE

PETITIONER

VS.

CERTIFICATE OF SERVICE

COMMONWEALTH OF KENTUCKY

RESPONDENT

I, John S. Gillig, counsel for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of October, 1985, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by depositing in the U.S. Mail, postage prepaid, a copy of same to Honorable J. David Niehaus, Deputy Appellate Defender, 200 Civic Plaza, 719 West Jefferson Street, Louisville, Kentucky 40202, Counsel for Petitioner.



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